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Supreme Court of the United States

OCTOBER TERM, 1921.

No. 147.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Appellant,

v.

THE UNITED STATES, *Appellee.*

Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

The matter complained of in this case, appealed from the Court of Claims, is a misapplication of half-rates for passenger transportation based on land-grants received by appellant, through its predecessors in title, from the United States. After some years of dispute over land-grants in the identical terms of those here at issue it was finally settled by adjudications of this court and the Court of Claims that for transportation of "troops of the United States" and all Government property there should be paid only fifty per cent of the amounts accruing at the ordinary tariff rates. In recent years there has been dispute, of various phases, between the railroad

companies and accounting officers of the Government over the word "troops," used in this reservation. A fertile field of controversy was covered in 1914 by a Court of Claims decision rendered in the case of *Alabama Great Southern Railroad Co.*, 49 Ct. Cls. 522, to the effect that organizations or members of the National Guard, *en route* to and from camps of instruction, though at the expense of the United States, were not within this designation and could not travel at the reduced rates. This court since, in *United States v. Union Pacific Railroad Co.*, 249 U. S. 354, has made a like decision in regard to recruits for the army, not actually enrolled therein, discharged soldiers and soldiers on furlough.

The case at bar concerns persons associated in various ways with the military or naval establishments of the United States, viz., applicants for enlistment in the navy and marine corps; members of the Naval Reserve, members of the Naval Militia; members of the Navy Auxiliary service; civil employees of the Navy Department; police officers; Coast Guards. The petition was dismissed by the Court of Claims for a reason that did not go to the merits of the questions here indicated. Appellant's officers, after various decisions had been rendered by the Comptroller of the Treasury applying military rates to all the classes of passengers in this category, had computed and presented their bills and, without protest, had received payment of the same, at military rates; and the court held that appellant was precluded thereby from claiming full rates. The court in its opinion said that for but this reason it would be disposed to give judgment for claimant with respect to discharged men of the navy, applicants for enlistment in the navy or marine corps, civil employees of the Navy Department and police officers, but that a majority of the court were of the

opinion that enlisted men of the navy and marine corps, officers of the navy and marine corps, the Coast Guard and men of the Naval Reserve, Naval Militia or Naval Auxiliary service in time of war were within the description quoted.

Assignment of Errors.

It is hereby assigned and charged that the Court of Claims erred:

1. In holding that land-grant rates are applicable to persons not traveling as part of a moving army, troop or body of soldiers of the United States.

2. As respects, severally, enlisted men of the navy and marine corps, officers of the navy or marine corps, members of the Coast Guard and men in the Naval Reserve or Naval Militia or Navy Auxiliary service, in holding that such persons were "troops of the United States" within the meaning of the acts of Congress reviewed.

3. In holding that, after decisions had been made by Comptroller of the Treasury in like cases denying full rates, appellant was bound by bills in which it applied reduced rates, based upon land-grants, or by accepting without protest payment at such reduced rates.

4. In dismissing the petition.

Propositions of Law.

1. The words "troops of the United States" in the land-grant acts do not include discharged enlisted men of the navy, applicants for enlistment in the navy or marine corps nor any other persons than members of the army, actually performing duty.

United States v. Union Pacific R. R. Co., 249 U. S. 354.

2. Naval Reserves, Naval Militia and men of the Naval Auxiliary service are not "troops of the United States."

Alabama Great Southern Railroad Co.'s case, 49 Ct. Cl. 522.

(3) Estoppel of a plaintiff does not arise from anything in which his course of action was not a cause of the course taken by the defendant, nor where the defendant, in the event of different action by the plaintiff, would have had no effective recourse, nor generally where, upon redress of a wrong by the suit, no loss nor disadvantage is imposed on the defendant which he would not have suffered by his acting originally as he should have acted.

Leggett v. Standard Oil Co., 149 U. S. 287 (294).
J. Homer Fritch Co. v. United States, 234 Fed. 608.
Weller v. Harrison Land Co., 195 Mich. 625.
Stoddard v. Johnston, 75 Ind. 20.
Zell's Appeal, 103 Pa. 344.
Stewart v. Parnell, 147 Pa. 523.
Meyer v. Mayor, etc., 63 N. Y. 455.
Union Nat. Bank v. Sixth Nat. Bank, 43 N. Y. 452.
San Pedro, etc., R. Co. v. Long Beach, 172 Cal. 631.
Martin v. Brown, 199 Ala. 134.

(4) One who was ignorant of the controlling facts, and was not charged by law to know them, is not estopped by any action he has taken upon a mistaken understanding regarding those facts.

Leggett v. Standard Oil Co. sup. (p. 274).
Meyer v. Mayor etc. sup.
Lawrence v. American Nat. Bank, 54 N. Y. 432.
City of Louisville v. Harlan, 97 Ky. 286.
Blanck v. Pioneer Mining Co., 93 Wash. 26.

(5) He who claims an estoppel of his adversary assumes the burden of proving every element thereof.

Perkins vs. Mo. Pac. Ry. Co., 76 Nebr. 242 (252, 253).
Beaufort County Lumber Co. v. Price, 144 N. C. 50.
Cooper v. Association of Railway Conductors, 156 La. 481.
Petring v. Heer Dry Goods Co., 90 Mo. 649 (657, 658).
Elliott v. Keith, 102 Ga. 117.
Sawyer v. Metters, 133 Wis. 350 (358).

(6) One person does not forfeit his right by omitting to make a claim when a like claim had been made by himself or others, on the same state of facts, without avail, or he is authoritatively notified that the claim, if presented, would not be entertained.

Southern Pacific Co. v. Bogert, 250 U. S. 483 (490).
Glavey v. United States, 182 U. S. 595.
State of Pennsylvania's case, 36 Ct. Cl. 507
Louisville & Nashville R. R. Co.'s case, 54 Ct. Cl. 161.
Howard v. France, 43 N. Y. 593.
Cox v. Stokes, 156 N. Y. 491 (511-513).
Taylor v. Hodges, 105 N. C. 344.
Appleton v. Barrett et al, 29 Wis. 221.
Kimball v. Farmers & Mechanics' Bank, 50 Wash. 610.

(7) Unless expressly required by law a protest, when money or any lawful benefit is denied, is not necessary in order to preserve the rights of the beneficiary.

United States v. Andrews, 240 U. S. 90.
United States v. Hvoslef, 237 U. S. 1 (8).

Argument.

The decision of this court in *United States v. Union Pacific Co.* 249 U. S. 354, leaves no ground for argument here in regard to discharged enlisted men of the navy, or applicants for enlistment in the navy or marine corps or any members of the military or naval establishment not traveling in the performance of duty. If men who were hoping to enlist, and had been accepted for enlistment in, or men who had been disappointed in the hope of enlisting in, or enlisted men who had been discharged from the army are not "troops of the United States," neither, surely, are applicants for enlistment in the navy or marine corps nor men discharged from the navy. But this case is concerned also with actual members of various other organizations; and each of those must be considered separately.

Militia.

The decision of this court in the Alabama Great Southern case, 49 Ct. Cl. 522, quoted approvingly by this court in the Union Pacific case, seems to determine the status of members of the Naval Reserve or Naval Militia. There it was held that organized bodies of State militia, (parts of the National Guard) were not "troops of the United States" even when traveling at the expense of the United States to and from camps of instruction; and the argument of the opinion applies to all parts of such or any other militia that, while traveling, are not "employed in the service of the United States," under the call of the President for which the Constitution and laws provide.

The Naval Militia was made up of State organizations, being merely part of the general militia recon-

stituted by the act of January 21, 1903 (35 Stat. L. ch. 204 p. 399). It was reorganized under act of Congress approved February 16, 1914 (38 Stat. L. ch. 21 pp. 283 *et seq*). The enacting clause of that act is: "That of the organized militia as provided for by law such part of the same as may be duly prescribed in each State, Territory, and for the District of Columbia, shall constitute a Naval Militia." Under section two of this act the Secretary of the Navy lends to the Governors of the States and Territories and the "Commanding General" of the District Militia vessels, stores, supplies and equipment; under section three the President, in the event of actual or threatened war, calls through the Governors etc., for such numbers of this militia as he deems to be necessary, etc. This militia, obviously, in times of peace, is a State, not a Federal organization.

The Naval Auxiliary Service *was* organized originally (in 1898) for a war purpose. The legislation was by a joint resolution approved May 26, 1898, (30 Stats. res. No. 38, pp. 744, 745), of which the enacting clause was as follows:

> "That a United States Auxiliary Naval Force is hereby authorized to be established, to be enrolled in such numbers as the President may deem necessary, not exceeding three thousand enlisted men, for the exigencies of the present war with Spain, and to serve for a period of one year, or less, and shall be disbanded by the President at the conclusion of the war."

Selection of merchant vessels was to be made by naval officers appointed by the Secretary of the Navy; the coast line was to be divided into districts; the personnel was to receive the same pay and emoluments "as those holding similar rank or rate in the regular navy;" and

the men were to be detailed by naval authority, with the consent of the Governor, the whole or any part of the organization of the Naval Militia of any State to serve in said Auxiliary Naval Force. Thus, it will be seen this organization succeeded the old-time naval militia, but for service during the war with Spain alone. Naturally, however, there were administrative duties to be performed after the war functions of the force had ceased, and small appropriations for the clerk work needed were made successively by almost every Congress.

Chronologically, there was, first, a Naval Militia belonging to the States and subject to State authority in times of peace; second, a Naval Auxiliary which would not function except during the war for which it was instituted; third, a new Naval Auxiliary, also part of the States' militia and serving the United States only when called out by the President, through the Governors. The transactions here concerned occurred mainly in times of peace, between June 1, 1910, and January 1, 1918. (Findings of fact paragraph 111, Rec. p. 5); and it seems clear enough that the naval militiamen, during those times, like the land militia, were not "troops of the United States."

The Naval Reserve, while a Federal organization, was not in a strict sense a part of the naval establishment—indeed was charged with no functions—in times of peace. This reserve force was created by this paragraph in the Navy Appropriation act, approved March 3, 1915 (38 Stat. L. ch. 83 p. 940):

> "There is hereby established a United States naval reserve, which shall consist of citizens of the United States who have been or may be entitled to be honorably discharged from the Navy after not less than one four-year term of enlist-

ment or after a term of enlistment during minority. The naval reserve shall be organized under the Bureau of Navigation and shall be governed by the Articles for the Government of the Navy and by the Naval Regulations and Instructions. Whenever actively employed with the Navy, or whenever employed in authorized travel to and from prescribed active duty with the Navy, its members shall be employed as members of the naval reserve and shall while so employed be held and considered to be in all respects in the same status as enlisted men of the Navy on active duty, except that they shall not be advanced in rating in time of peace. When not actively employed with the Navy, members of the naval reserve shall not be entitled to any pay, bounty, gratuity, or pension except the pay expressly provided for members of the naval reserve by the provisions of this Act, nor shall they be entitled to retirement by reason of such service in the naval reserve."

Following are the provisions of the same acts as to the service to be performed (Ib. 941):

"Members of the naval reserve [redacted], in time of peace, may be required to perform not less than one month's active service on board a vessel of the Navy, during each year of service in the naval reserve, and such active service shall not exceed two months in any one year: *Provided*, That the aforesaid active service with the Navy may be required at any time after entrance in the naval reserve. In time of war they may be required to perform active service with the Navy throughout the war, not to exceed the term of enlistment in the case of those enlisted in the naval reserve."

* * *

"The Secretary of the Navy is authorized in time of war, or when, in the opinion of the Pres-

> ident, war is threatened, to call any enlisted man on the retired list into active service for such duty as he may be able to perform. While so employed such enlisted men shall receive the same pay and allowances they were receiving when placed on the retired: *Provided*, That enlisted men on the retired list shall not be eligible for enlistment in or transfer to the naval reserve."

Here is another kind of militia. It differs from the Naval Militia and National Guard organizations at large of the States in the particulars (1) that it was not automatically bound to perform any practice service, or anything of the kind, during peace and (2) that there was no intermediate, local authority by whom the calls of the President for service were to be effectuated. In the latter respect this organization was on the same footing as the National Guard of the District of Columbia. Since there was no executive of the District of Columbia having authority over the militia, the calls of the President in this case go, as we have seen, to the commanding General of the militia. The District militia, however, is required to perform during peace the duties that keep it ready for any emergency, whether riot-suppression or war. Obviously, however, the District militia is included in the observations made by the Court of Claims in the Alabama Great Southern case regarding militia generally; and if that particular kind of militia is not "troops of the United States," it would be strangely illogical to apply the latter term to men, discharged from the navy, who were organized in a loose form, under no obligations to perform during peace any service analogous to that of the National Guard nor any practice service whatever except when the Secretary of the Navy might deem that desirable.

Actual Personnel of the Navy and Marine Corps.

As this court has observed in the Union Pacific case, the free-transportation phrase in the early land-grant legislation, viz., of 1822 and 1833, was "any property of the United States or persons in their service." There was reconsideration in the making of the later acts of the years 1856 to 1871, including those by which the Louisville & Nashville railroad has obtained lands, and "persons in their service" gave way to "troops." Is it not to be inferred that the naval establishment, indeed all servants whoever of the United States other than officers and soldiers of the army, were intentionally excluded? It was impossible that Congress should not be conscious of the navy. Nothing was more conspicuous in the written history of the country in those days than the war in 1812, and the navy was justly acclaimed in those chronicles because, to say the least, it had won a large measure of successes. But it was also understood, necessarily, that the navy, as compared with the army, could not have any very great need of land transportation, no more than the personnel of the State, Treasury or Postoffice Departments (when there were no railway mails) and so Congress evidently was content that its bargaining for a measure of free transportation on the railroads to be constructed should be restricted to the army.

"Troops" are fighting forces. Sailors who manned war vessels in the earlier days and in the later years, when they have more generally been called members of the navy, as a rule were and are not fighters. Some carry and are trained to the use of arms, whether ordnance or side arms; but the larger duties of all of them are mechanical, having to do nowadays with the operation of great machines. They are so essentially different in

functions from soldiers that the two are not confused in popular speech. The newspapers will tell of soldiers marching in a parade and of sailors marching immediately behind them. A child will come home and tell of an altercation which he witnessed on the street between, as he will say, a "soldier" and a "sailor." He knew the sailor, as his grandmother might have known him, from his peculiar uniform, with its absence of any suggestion of arms-bearing. If an organized body of sailors marched alone through the streets neither this child nor more mature observers would say they had been watching the "troops" go by.

The marines *are* strictly a fighting force. They really, aboard ships or in naval barracks, bear arms. On occasion they perform in a smaller way the same duties that attach to the infantry of the army. During the late war with Germany the marines performed gallantly and won great glory as parts of the American army organization in France. At such a time, while so functioning, marine organizations are in the jurisdiction of the War Department. At other times, and on all the occasions with which this claim is concerned, the Marine Corps belongs to the Navy Department, and therefore what has been said above in regard to the navy would seem to apply as well to the marines.

But, however useful the marines may have been in latter years, it is scarcely conceivable that Congress had them in mind when providing for land-grants to the railroads and stipulating for special rights to the Government in the transportation of "troops."

Again, whatever may be said of organized bodies of marines, individual members of that corps when traveling for their personal purposes can hardly be classed as "troops" for the purpose of rate-making.

Coast Guard.

The act of January 28, 1915, "to create a Coast Guard by combining therein the existing Life-saving Service and Revenue Cutter Service (38 Stat. L. ch. 20 p. 800), made the new organization part of the military forces of the United States, to operate in time of war, as "a part of the navy" but in time of peace as "under the Treasury Department." The peace-time functions of the new organization were those of the two organizations which it superseded, being of a police nature. Its personnel were no more "troops" than are collectors of internal revenue, or the modern raiding forces of prohibition officers, or the keepers of lighthouses.

Civilian Employees of Navy Department and Police Officer.

It would hardly be contended that the hundreds of clerks in the offices of the War and Navy Departments at Washington are "troops;" and there would be little reason to apply that name to them if they were actually traveling with, and doing service for, organized bodies of troops. No doubt such clerks during the late war with Germany were shifted back and forth between Washington and points of concentration in France or England, according to the conveniences of the military or naval operations; but, as they were not "troops" when at their desks at Washington, there is no good reason to say they were "troops" when performing similar duties in foreign countries or aboard railroad trains in this country.

For all that the present record shows, the travel of some of the civilian employees concerned may also have been in time of war, since the claim and findings run to the end of 1917.

Occasions of Travel, Official or Unofficial.

In the foregoing remarks distinction is not made, under any head, between travel done in the performance of official duty and travel for personal purposes of the passenger; but, no matter to what class the passenger belonged, the decision in the Union Pacific case would seem to require payment of full fare for his travel if he were on furlough or pursuing any purpose of his own rather than performing the duty of his employment. In no instance does the record state the purpose of the travel. On this point, however, as on the question of war travel or peace travel, intendments would reasonably be made against the Government, since one who contends for an estoppel of his adversary assumes the burden of proving every detail of fact necessary to constitute the estoppel (Cases cited on the flyleaf hereof amply illustrate this proposition). If this court should take a different view it would not be difficult to establish from the Government's own records all the important facts, and before the hearing precautions will have been taken for the supplementing the record to such extent as may be necessary. Why there is not a more adequate record for a final decision of all questions, will be explained hereafter.

Appellant is not estopped by the Treasury settlements.

The Court of Claims concludes that the Navy and Marine Corps and Coast Guard are parts of the "military organization" of the country and that this makes them "troops of the United States." But as to all the classes involved except the Coast Guard it holds that appellant could recover nothing because its bills were rendered to

the Government at the land-grant rates and that generally settlement at those rates was accepted without protest in all cases excepting the Coast Guard. The case that appellant endeavored to present to the Court of Claims is that appellant made its bills, and forebore protest, because it had been admonished by pertinent decisions of Comptroller of the Treasury that no more than land-grant rates would be paid. In four of those decisions, as follows, of the dates stated, land-grant rates were held to be applicable to the classes of passengers stated.

2. Compt. 415, February 26, 1896. Soldiers traveling at their own expense.
14 Compt. 453, February 26, 1908. Recruits en route to recruiting depots.
14 Compt. 78, May 13, 1908. Soldiers on furlough.
16 Compt. 70, August 3, 1909. State Militia traveling at expense of the United States.

In another decision, 21 Compt. 276, rendered October 31, 1914, it had been held that the term "troops" comprehended: "the entire military, including naval forces of the United States, that is the army and navy and all parties connected therewith, including their civilian employees and agents."

The fact of these decisions is within the judicial knowledge of this court. The Court of Claims refused to give any significance to this fact, and appellant's knowledge thereof, as the cause of the statement of its bills at land-grant rates, and denied motions of appellant to set the judgment aside and to amend the findings.

The judgment of the Court of Claims can hardly be reversed unless the case is distinguishable from the *Oregon-Washington Railroad & Navigation Co.'s* case in

which this court on March 7, 1921, affirming the Court of Claims, rendered a decision unfavorable to the claimant. The subject of that case was the freight rates to be applied to personal belongings of army officers. In two previous cases, of the *Chicago, Milwaukee & St. Paul Ry. Co.* 50 Ct. Cl. 412, and the *Louisville & Nashville Railroad Co.* Ib. 414, it had been decided that such private property was subject to full tariff rates, and judgments were given to the claimants for the shrinkage resulting from the application of land-grant rates. In the case of the *Baltimore & Ohio Railroad Co.* 52 Ct. Cl. 468, the claimant was denied like reimbursement because its bills had been rendered at land-agent rates and there was no evidence that the claimant deemed itself entitled to any more. This latter is the ground taken by this court, as well as by the Court of Claims, in the dismissal of the Oregon-Washington case.

A true parallel to the instant case, appellant submits, is afforded by a second action of the Louisville & Nashville Railroad Co. on that same question, 54 Ct. Cl. 161. The question of a waiver by billing at net rates, which had not been raised in the two first cases above, was raised in that case and proof was made by the claimant that, after it had obtained the earlier judgment, it, by its attorney (before the Baltimore & Ohio case was heard), had consulted the Comptroller of the Treasury and he had stated that, notwithstanding the two adjudications, he would not permit payment of any other than land-grant rates, and so that bills still were computed and filed at land-grant rates because, although the claimant did not regard those as full payment, it was useless to bill for any more. Here, it will be observed, was a single, informal expression by the Comptroller. If a claimant loses no rights by accepting such declaration, for the convenience

of all parties, as a guide to its accountants, how can it be said to have waived its rights by accepting for the same purpose, for the same reason, five formal decisions of the same officer, who was the final authority on Treasury disbursements?

As regards State militia, it is true that the Comptroller's ruling of August 3, 1909, had been overturned by the decisions of the Court of Claims in the Alabama Great Southern case, rendered on May 18, 1914; but the claimant could not have assumed that for that reason the Comptroller would make a different ruling when the same matter came to him again. Indeed in the personal-property case of the Louisville & Nashville Company the Comptroller in reality continued to apply his former rule notwithstanding the decision of the Court of Claims to the contrary effect,—and from this inflexibility of the Comptroller the new suit sprang.

On four of the five questions decided by the Comptroller, all included in the present suit, there had been no adjudications at the Court of Claims or elsewhere. Claimant's Auditor would have been strangely optimistic, strangely prodigal of the time and labor of his clerks who prepared the bills and kept the books thereon, if in this state of facts he had persisted in making the bills at full tariff rates.

The decision of this court in the Oregon-Washington case is rested on the mental attitude of the railroad company. The present appellant is contented to put its claim upon the same ground, for, firstly, there is nothing in the facts found by the Court of Claims to suggest that appellant's officers gave their mental assent to the rulings which had been made by the Comptroller and the practices pursued thereunder at the Treasury, and, secondly, the opposite of that proposition should have been found by the Court of Claims either upon the submission of the case

or under a motion to set the judgment aside and amend the findings.

This case is not affected by the rule regarding mistakes of law which occur in the process of making contracts—the rule that the courts will not, for the reason that a party misunderstood his legal rights when going into the contract, relieve him from the performance of his undertakings. Here the contract (implied), arose in each case at the time of the transportation. The railroad company then contracted to transport the passengers and the Government contracted to pay lawful fare for the service. There was no contract of any kind when claimant presented the bill and sought to be paid for the service, and it is submitted that, in the absence of any injury sustained by the Government in the underbilling, there is no lawful reason why the amounts of the underpayments should not now be paid. Suppose that some new (or, for that matter, old but incompetent), clerk or auditor of this appellant had supposed that its main line from Louisville to New Orleans was land-aided throughout, and therefore had rendered bills with land-grant reductions covering the entire mileage instead of the truly land-aided part thereof, lying between Decatur and Flomaton, Alabama. Would it be contended that appellant could not maintain a suit, instituted at any time within the six years limited, to recover the underpayments that accrued on the unaided mileage—that as matter of *contract* it was found by its bills? But if not, why should it be said that an underclaim of other origin cannot be corrected in appellant's favor?

So there is nothing in the present record beyond the fact that appellant's officers rendered their bills for less than is now claimed but for all that they possibly could collect at the Treasury. In other words it is sought to put

this appellant out of court for the lack of an idle ceremony, such as the law requires of no man.

The Court of Claims itself in the case of the *State of Pennsylvania*, 36 Ct. Cl. 507, said:

> Estoppel for failure of presenting a claim cannot be set up by the party whose officers decide that presentation would be a useless procedure.

The same doctrine has been applied by that court and this court in other cases. In *Glavey v. United States*, 182 U. S. 595, the plaintiff, who had served as a special inspector of foreign vessels while holding another position in a custom-house, recovered compensation for such additional work notwithstanding that he had not made any claim thereto, the Secretary of the Treasury previously having made it known that this would not be paid. Other typical cases in which a creditor was held not to have prejudiced his rights by not making a demand when he knew that there would be no compliance are:

Howard v. France, 43 N. Y. 593.
Appleton v. Barrett, 29 Wis. 221.
Taylor v. Hodges, 105 N. C. 344.
Kimball v. Farmers & Mechanics' Bank, 50 Wash. 610.

This court in *Southern Pacific Co. v. Bogert*, 250 U. S. 483 (490) has said that where a number of persons have the same rights, which some of them are asserting by suit, the others are not guilty of laches when they await the result of those proceedings before taking action. There is cited in that opinion the very clear case *Cox v. Stokes* 156 N. Y. 491 (511-513). This latter is pertinent here because, during the time when the Louisville & Nashville Railroad Company was abiding the rulings of

the Comptroller cited above, with which the land-aided railroads at large were concerned, the Union Pacific Railroad Company was prosecuting the suit which reached a conclusion in this court on March 31, 1919.

The question of protest *vel non*, upon payment received, is likewise immaterial when it does not appear that this would have induced any different action by the other party. Even where a benefit, legally due, was accepted with a legal condition attached and the beneficiary did not at the time enter his protest against the condition, he was entitled to the full benefit stated undiminished by the condition, which was reduction of pay by one-half. *United States v. Andrews*, 240 U. S. 90; 49 Ct. Cl. 391.

A clear illustration of the rule that if the law does not expressly require a protest, rights are not forfeited by omission thereof is *United States v. Hvoslef*, 237 U. S. 1 (8).

To restate the propositions above: appellant's action in the computing and presenting of its bills was not the real cause of the Government's action in payments made. The Government's disbursing officers did not pay appellant at the rates here complained of *because* claimant had applied those rates in its bills; they paid land-grant rates because the Comptroller of the Treasury, by the five decisions here cited, had enjoined them to pay those rates and no more. Appellant would have received the same amounts if all the bills had been made up in the first instance by quartermasters; and it would have received the same amounts if, making bills, it had claimed the full tariff rates or twice or ten times those rates. In other words, the action of the Government's officers would not have been different if appellant's officers had called for payment at tariff rates.

The rule of law here asserted was applied in *Leggett v. Standard Oil Co.*, 149 U. S. 287 (294), and other cases cited on the fly leaf hereof.

The claimant in *Leggett v. Standard Oil Co.* had disclosed some ideas of his own to officers of the defendant, but without expressing any purpose to obtain a patent. On reconsideration, and after the defendant had applied his ideas, he did get a patent and, sueing for an infringement thereof, pleaded that the defendant was estopped to deny its novelty. This court, observing that the plaintiff's abstention from proceeding seasonably to get a patent was not chargeable to anything that had been none by defendant's officers, held that there was no estoppel.

For the same basic reason it has been held that there was no estoppel when, a judgment note having been forged, the person whose name was forged omitted for some days to give notice to a purchaser of the note, but it did not appear that within that time any effective step could have been taken against the forger.

Zell's Appeal, 103 Pa. 344.

Analogous to the latter case is *Union National Bank v. Sixth National Bank*, 43 N. Y. 452.

It is not to be assumed (in order to construct an estoppel) that if in 1915 the Louisville & Nashville officers had demanded tariff rates for these classes of passengers the Government's officers in 1916 and 1917 would have had their men travel by other railroads. These, rather, should be supposed to be facts: (1) in many instances there was no railroad but the Louisville & Nashville, and (2)—as indeed must be known judicially to this court—passenger fares between any points, under the tariffs, are the same on all lines that are truly competitive.

From whatever angle the facts of the present case be viewed it is evident that the Government could not possibly be injured by appellant's postponing, until the time chosen for its suit, its demand for the application of full tariff rates to the classes of transportation listed in the petition.

If there had been a chance that the Government would lose something by the abeyance of appellant's demand for full fares, there still would be no estoppel, because it does not appear that the railroad officers knew the status of the individuals for whom transportation was demanded nor whether they were traveling for the Government's concern or their own. The Government's requests for passenger transportation do not carry those full descriptive details to which, with respect to freights, this court has adverted in the Oregon-Washington case.

It scarcely seems proper to say more of these particulars just now. Surely it *is* in order to say again that here are things which the Government had the burden of proving and which are not proved. The facts can be made indubitably clear by the supplemental findings which will be suggested in a motion for a remand.

History of the Present Case and of the Record.

The case of the Union Pacific Railroad Company, decided by this court on March 31, 1919, was instituted at the Court of Claims on April 29, 1915. The decision of that court was rendered on February 19, 1917. The petition was filed in the instant case on June 1, 1916. So whatever may be said as to the motive cause of the Oregon-Washington suit on the personal-effects question, it cannot be charged that the suit which the Louisville & Nashville Company is here prosecuting was suggested by the success of the Union Pacific Company in its suit

on like (passenger-rate) questions. The Union Pacific case *had* been decided in this court when the instant case was presented for the decision of the Court of Claims. The case was called and was argued with thoroughness satisfactory to counsel on both sides on April 21, 1919. The hearing was simplified by a stipulation which counsel had filed showing the aggregate amounts involved as to each class. There also were submitted on claimant's part (1) a request for findings of fact and a skeleton brief entitled "Claimant's Propositions and Authorities." The court did not proceed to decide upon the merits of the case so made, but on April 21 following remanded it to the calendar with directions that, under each head of the stipulated statement, a severance be made between amounts accrued in periods covered (1) by the original petition and (2) by an amended and supplemental petition filed on February 12, 1919 (Rec., p. 3). This latter was done, an amplified stipulation was signed and filed and the case came on for hearing again on October 29 of the same year. Counsel for claimant then commenced an argument, but the Chief Justice interrupted and said that the remand had been made because the court wished to know how the time-limitation on the court's jurisdiction might apply, and that, since it appeared from the new stipulation that no question of limitation was presented, the court was disposed to give claimant a judgment. Counsel in reply said he had purposed to say something more regarding some of the classes of passengers and regarding the five Comptroller's decisions by which claimant's officers had been guided but that those decisions at least were cited in the brief filed and he now supposed that was sufficient; and there discussion of the case ended—with no question open for speculation of counsel except the items and amount of the

reimbursement claimant would recover. On December 1 following the court announced its judgment, holding that claimant was bound by its net-rate bills or lack of protest and could recover nothing. Claimant moved both to set the judgment aside and to strike out so much of the findings as stated the non-claim and the absence of protest, but the motion was overruled.

Appellant is not here to ask this court to say that the method of the Court of Claims in dealing with this case was the least bit less than judicial. But it does seek to make clear to this court that the absence from the record of so many details of fact by which the final judgment may be shaped is chargeable to the action of the Court of Claims in framing the issues so as to exclude from consideration every question but that of time-limitation. The question presented to this court *in limine*, because covering the entire claim, is that of appellant's estoppel. It is conceivable that before deciding that question this court will desire to be informed by the Court of Claims (1) whether appellant's agents, when making their bills, were informed of and governed by the five Comptroller's decisions which, conjunctively, made any collection of full rates impossible, and (2) what information, if any, appellant's agents had at those times in regard to the relations of the passengers to the Government. But even though on the present record the court takes a view generally favorable to appellant, it possibly will hold that distinction should be made—for which the record furnishes no data—(1) between war-time service and peace-time service, and (2) between public and private purposes in the travel. All or any of these facts, of course, this court would obtain by the method of a remand to the Court of Claims; but counsel could not count that a remand would be granted in advance of the discussion of

the case at large—so much of the merits of the case is involved in any question of supplementing the record and so inevitably do the degree and the details of such supplementing depend on the view this court will take upon the hearing. Obviously, if the court should be impressed that on the broad grounds of the controversy appellant is in the right and the Court of Claims has erred, a remand would be confined to a few subsidiary points of fact; or possibly the court would reverse the judgment and lay down the lines on which judgment should be rendered for appellant when the Court of Claims has determined the facts.

A precautionary motion for a demand, supported by parts of the evidences that were submitted to the Court of Claims, will be prepared in time for the hearing.

By whatever steps a final decision of the case is reached, it is hardly to be apprehended that this court will lay down, as a canon of Government debt-paying, that when Government officers have announced a ruling which is unsatisfactory to any creditor, he and all others in the same situation, if they are not to be barred out of court, must, on every future transaction, go through the form of computing and submitting a bill which is condemned in advance by that rule, and so pile up labor uselessly for the Government's employees as well as for themselves.

BENJAMIN CARTER,
Attorney for Appellant.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Appellant*,
v.
THE UNITED STATES, *Appellee*. } No. 147.

APPEAL FROM THE COURT OF CLAIMS.

MOTION OF APPELLANT TO REMAND TO THE COURT OF CLAIMS FOR ADDITIONAL FINDINGS OF FACT.

Appellant by its attorney shows to the court the following facts:

(1) The subject matter of this suit is the application of land-grant rates to the transportation of (*a*) various classes of officers or men in the Naval Establishment, including the Marine Corps, (*b*) discharged enlisted men of the Navy, (*c*) applicants for enlistment in the Navy or Marine Corps and (*d*) Coast Guards. In a memorandum opinion accompanying the findings of fact, it is stated, as the opinion of the majority of the court, that all of these passengers except the discharged men of the Navy and the applicants for enlistment were "troops of the United States," within the meaning of the land-granting acts. The dismissal of the claim at large was put

upon the grounds that, except with respect to the Coast Guards, bills had been rendered by claimant (appellant here) at land-grant rates, and that there was no protest in any case when payment was received at those rates.

(2) The case came to a hearing in the Court of Claims on April 21, 1919. There was filed a stipulated tabulation showing the amount involved as to each class of passengers. There was filed also on claimant's part a typewritten brief entitled "Claimant's Propositions and Authorities." The case was argued on the merits and submitted. On May 5, 1919, the court filed an order remanding the case for the purpose of the classification of each class of passengers between (*a*) the period antedating the filing of the original petition and (*b*) the subsequent period terminating with the filing of a supplemental petition. This classification was made by a new stipulation of counsel and the case was briefly discussed and submitted on October 29, 1919. Claimant's counsel again stated his position regarding each class of passengers concerned and spoke of five decisions rendered by the Comptroller of the Treasury before the commencement of the suit, dictating the payment of land-grant rates in like cases, which rulings were set up by claimant as its officer's reason for omitting to compute and state their bills at full tariff rates; but, instead of hearing full discussion of this matter or any other, the court stopped counsel, saying that the remand had been made by the court in order to determine whether any part of the claim was beyond the court's jurisdiction by limit of time, that the stipulation showed that no part of the claim was barred and that it was the court's purpose to give claimant a judgment. On December 1 following, the court announced its findings and conclusions, as stated above, dismissing the petition *in toto*.

(3) By said order of remand filed on May 5, 1919, said court put the case upon the one issue of the court's jurisdiction, as affected by the six-years limitation; and at the final hearing immediately preceding the submission of the case for judgment the court, by its observation referred to above, re-stated that issue and apprised counsel that there was no reason for severance of the claim, or any part of it, with reference to any other question.

(4) For the reason stated above no severance was made, and in the findings of fact and memorandum opinion no distinction is drawn, between travel for public purposes and travel for private purposes of the passenger nor, except as to three classes only, between transportation of war time and transportation of peace time; and the findings do not state whether, when preparing and filing their said bills, claimant's officers had any knowledge or notice on those points.

(5) On January 29, 1920, claimant moved to set aside the judgment and to amend the findings of fact by striking out all that related to the character of claimant's bills presented and its failure to make protest on receiving payment, and with its motion there was filed an affidavit of claimant's Auditor of Receipts, who had charge of the computing and presenting of bills, in which he stated that in this case he was aware of, and had been governed by, the decisions of the Comptroller of the Treasury which were named in "Claimant's Propositions and Authorities"; also that claimant's by-laws forbade surrender by him of its claims. On March 15 following this motion was overruled.

Appellant moves that this court will remand the case to the Court of Claims with directions to make supplemental findings on the following questions or such thereof as this court may find to be material:

Were appellant's officers, when making their bills regarding the transportation in question, informed of the five decisions of the Comptroller of the Treasury which, conjunctively, made any collection of full rates impossible, and, if they had such information was that the reason of their making such bills at land-grant rates?

Did the applications made to appellant's station agents for transportation state whether the intended passengers were enrolled members of any naval or marine organization of the United States and whether the intended travel was for the performance of official duty or for private purposes of the passengers?

With respect to each of the ten classes of passengers concerned what amount, included in the money claimed, accrued on travel originating before the 6th day of April, 1917, and how much on travel originating on or after that date?

With respect to each of said classes of passengers what amount, included in each of the sub-totals called for under the head next above, accrued on travel which was for Government purposes and how much on travel which was for private purposes of the passengers?

Appellant appends hereto certified copies of papers in the Court of Claims record of the case, marked as exhibits, and prays that the same may be read as parts of this motion, viz:

Exhibit A. "Claimant's Propositions and Authorities."

Exhibit B. Affidavit of George Becker, Appellant's Auditor of Receipts, filed in support of motion to set aside judgment and amend findings.

Exhibit C. Government's request for transportation. (Specimen of numerous requests transmitted by Treasury Department.)

BENJAMIN CARTER,
Attorney for Appellant.

DISTRICT OF COLUMBIA, *ss:*

Before me, Jesse L. Conwell, a Notary Public in and for said District, Benjamin Carter, whose name is signed to the foregoing motion, being by me sworn, made oath that the averments of said motion are true.

BENJAMIN CARTER.

Subscribed and sworn to before me this 11th day of February, 1922.

JESSE L. CONWELL,
Notary Public.

[SEAL.]

MEMORANDUM.

This motion is filed in pursuance of a purpose announced in the brief filed for appellant on the merits of its appeal. The exigency which calls for, or at least suggests, this step was necessarily stated in that brief; and it is assumed that the court would not wish the argument to be repeated here. It seems sufficient to say that the motion, with its exhibits, demonstrates that the Court of Claims, in effect, framed a single issue and forbade consideration of the other questions, some of which can only go to parts of the claim that are presented in the motion as heads for supplemental findings, and that it refused to set aside the judgment and permit claimant to make proof even on a point raised, for the first time, by the court itself when it came to make its decision.

BENJAMIN CARTER,
Attorney for Appellant.

EXHIBIT A.

IN THE COURT OF CLAIMS.

The Louisville and Nashville Railroad Company,
v.
The United States. } No. 33,290.

CLAIMANT'S PROPOSITIONS AND AUTHORITIES.

1. By the following decisions of the Comptroller of the Treasury, forbidding payment to claimant and other railroad companies of more than land-grant rates for passengers of the several classes named, claimant is excused for the presentation, whether to disbursing quartermasters or to the Auditors of the Treasury, of bills in such cases computed at land-grant rates, and its right to claim full rates in this court is not prejudiced.

2 Compt. 415; February 26, 1896.
Land-grant rates held applicable to soldiers traveling at their own expense.

14 Compt. 778; May 13, 1908.
Same as to soldiers on furlough.

14 Compt. 543; February 26, 1908.
Same as to recruits traveling from stations to recruiting depots.

16 Compt. 70; August 3, 1909.
Same as to State militia traveling at expense of the United States.

21 Compt. 276; October 31, 1914.

"Troops" held to comprehend "the entire military, including naval forces of the United States, that is the army and navy and all parties, connected therewith, including their civilian employees and agents."

21 Compt. 751; March 24, 1915.

"Troops" held to comprehend "all persons for whom transportation is required in connection with its [United States] military service."

2. The Auditor for the Navy Department and the disbursing Quartermasters did not pay claimant at land-grant rates *because* it claimed no more in its bills—they paid these rates because enjoined to do so by the Comptroller's decisions. On paying now, by judgment of this court, the land-grant abatements, the United States, to say the least, will be in no worse position than if those amounts had been paid in the original settlement. No proof is offered for the Government that, but for this claimant's continued acceptance of payment at land-grant rates, the Government would have obtained the same transportation from other railroad companies at less than the full rates claimed in this suit. For each of these reasons no estoppel arises in this suit.

Leggett v. Standard Oil Co. 149 U. S. 287 (294).

J. Homer Fritch Co. v. United States, 234 Fed., 148.

In re Froelich, 192 N. Y. 566.

Plummer v. Mold, 22 Minn., 15.

Amundson v. Standard Printing Mfg. Co., 118 N. W. (Iowa) 789.

Weller v. Harrison Land Co. 161 N. W. (Mich. 894.

Sheffield Car Co. v. Constantine, 137 N. W. (Mich) 305.

Swain v. Seamens, 9 Wall., 254 (274).
Bankers Surety Co. v. Maxwell, 122 Fed. 797 (801).
San Pedro, etc., R. Co. v. Long Beach, 158 P. (Cal.) 204
Stewart v. Parnell, 147 Pa. 523
Appeal of Zell, 103 Pa. 344.
16 Cyc., 744, and numerous cases cited.

3. "Troops" are officers and private soldiers of the army—none others.

Alabama Great Southern Railroad Co. v. United States, 49 Ct. Cls. 522.
United States v. Union Pacific Railroad Co., U. S. Supreme Court, decided March 31, 1919.

2. The land-grant acts, while making no distinction between classes of Government "property," do, in the matter of passenger transportation, set apart the personnel of the army from the Navy and from all other servants of the Government. *Semble*, also even as regards officers of the army or soldiers, land-grant rates cannot be claimed except for a person, or some body of persons, traveling for some actual exigency, in war or in peace, of the army.

United States v. Union Pacific Railroad Co., sup., last paragraph of page 2 and first paragraph of page 3, advanced print.

5. The Marine Corps is part of the Navy. During war marines serve as soldiers, under command of army officers, but in peace they have no connection with the army.

The enlisted men of the Navy, and civilian officers attached thereto, primarily are not fighters ("troops") but operators of ships, ship yards, etc. (The enlisted men carry no arms.) In peace times then, to say the least, of-

ficers and sailors, etc., of the Navy are not "troops." For definition of Navy see

Act approved March 3, 1893 (27 Stat. 730); compiled Statutes 1918, Sec. 2571.

6. Coast guards, by the act of January 28, 1915, (38 Stat. 800; Compiled Statutes, sec. 8459-½a) are made part of the military forces (but not part of the army), to operate during war as a part of the Navy. In peace they belong to the Treasury Department.

Long ago the Comptroller of the Treasury decided that employees of the War Department not performing army service (workmen on a river improvement) are not to be transported at land-grant rates (4 Comp. 231).

Leigh's case, 43 Ct. Cls. 374, and Berryman's case Ib 397, decided what was war service and fixed the claimants' pay accordingly. The meaning of the word "troops" was not considered.

Jonas's case, 50 Ct. Cls. 281, decided that the term "Naval officer" in the act of Congress interpreted (approved August 22, 1912) did not include an officer of the Marine corps.

Comment is made in these cases on the anomolous character of the Marine corps. This latter is clear from the fact that laws were deemed necessary (Rev. Stats. Secs. 1612 and 1622) to give to officers of the Marine Corps the same pay, retirement rights, etc., that were due to army officers.

United States v. Dunn, 120 U. S. 249, decided that Marine-corps service is Navy service for the purposes of longevity pay. Whether members of either of these branches of the service were "troops" was not considered.

BENJ. CARTER,
Attorney for Claimant.

Filed April 24, 1919.

A true copy. Test this Feb. 10, 1922.

F. C. KLEINSCHMIDT,
Assistant Clerk, Court of Claims.

EXHIBIT B.

State of Kentucky, }
County of Jefferson }

Before me, C. W. Shaft, a Notary Public in and for the State and County aforesaid, appeared this day George Becker, who, being by me sworn, made oath and said, that at the times hereinafter named or referred to he was Auditor of Receipts of the Louisville & Nashville Railroad Co., that there were prepared in his office, as such Auditor, the bills of said company relative to the transportation of passengers which is the subject of suit in the Court of Claims case numbered 33,290; that at the times of the preparation of said bills, affiant had been informed that, under decisions made by the Comptroller of the Treasury, no more than land-grant rates would be paid by the accounting officers of the United States for transportation of any persons belonging to or connected with the military or naval forces of the United States or of recruits for such forces; that in affiant's judgment there were truly due and payable for all such passengers, other than officers or soldiers of the United States Army, actually performing duty at the time, the full rates which were paid by passengers traveling on private account, and that said bills were made at such net rates for the reason alone that affiant was aware that anything claimed above such rates would be disallowed; and, in preparing and submitting such bills, he had no intention or thought of consenting that no more than the amounts stated therein was due for the transportation described.

Affiant says further that those parts of the by-laws of said company, in effect at the times when said bills were prepared, governing the chief accounting officers thereof were as follows:

> "*Comptroller.* The Comptroller shall have the direct charge of all the books and accounts of the Company, and shall see and know that the system of keeping the same is fully enforced and maintained. No change shall be made in the forms and

blanks relating to receipts and disbursements now in use on the several divisions of the Company's line, without the written consent of the Comptroller. He shall appoint with the approval of the Second Vice-President all the officers and their assistants in his department. It shall be his duty to know that all bonds required by the regulations of the Company are given. All bonds for the faithful performance of the duties of officers, agents, and employes shall, upon approval of the chief attorney, be transmitted to the custody of the Comptroller. He shall be aided by an Assistant Comptroller, who shall perform such duties as may be assigned to him by the Comptroller, and shall act for him in his absence. The Comptroller shall also be aided by an Auditor of Receipts and an Auditor of Disbursements.

"*Auditor of Receipts.* The Auditor of Receipts shall have immediate charge of all accounts relating to the earnings of the Company. He shall report to the Comptroller all deviations from the system of accounts prescribed for the agents in the employ of the Company. He shall under the supervision of the Comptroller, cause an examination of the accounts of agents to be made as often as may be necessary. He shall be aided by an Assistant Auditor, who shall act for him in his absence, and perform such duties as may be assigned him."

Affiant says further that by said by-laws and by the practices in the offices of said company at said times, affiant as such Auditor had no authority, unless by express direction of the Comptroller, the legal department or the traffic department of the company, to compromise any claim of the company against the United States or any other debtor or to render bills to any debtor for any less amounts than were truly due to the company for the services to which the same referred.

GEORGE BECKER.

Subscribed and sworn to before me this 26th day of January, 1920.

C. W. SHAFT,
Notary Public.

(Indorsements)

No. 33290. Louisville & Nashville Railroad Co. v. The United States.

Affidavit of George Becker in support of claimant's motion for new trial.

Filed. Jan. 29, 1920.
Court of Claims.

BENJ. CARTER,
Attorney for Claimant.

A true copy. Test:
F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

EXHIBIT C.

Form No. 240-10 Ticket No. 2337 Charge $10.53 (In left margin.)

GOVERNMENT REQUEST FOR TRANSPORTATION
UNITED STATES
TREASURY DEPARTMENT

Good until — No. 26764
used 19.. — Washington, D. C.,
Not transferable — February 25, 1917

The L. & N. & S. A. L. Company will please furnish One (1) 1st class limited ticket to Dist. Supt. Jno. W. Richardson C. G. and no other ..... from Pensacola to Jacksonville, Fla...Standard..berth..via L. & N. & S. A. L.—tourist—berth—seat—

(Initials of other lines interested)

By direction of the Captain Commandant.
O. M. Maxam.
(Name and title of officer countersigning)
Chief, Division of Operations.

W. G. McAdoo
Secretary of the Treasury.

I certify that transportation has been furnished as above, or as follows, Pensacola, Fla., Feb. 25, 1917, One 1st class limit ticket;..standard..berth..tourist..berth..; ..seat.

John W. Richardson, Dist. Supt. U. S. Coast Guard
(Signature of Traveler) (Official title)

To be billed to Coast Guard, Treasury Department, Washington, D. C.
(Name and address of officer to whom bill or voucher is to be sent by transportation company)

NOTE: FOLLOW STRICTLY THE INSTRUCTIONS OF THE REVERSE HEREOF.

(Printed on back)

Committee on Forms, Feb. 23, 1912. Form No. 1798. Approved by the Comptroller of the Treasury, March 20, 1912.

NOTE TO TRANSPORTATION COMPANIES.

(a) Service performed under this Request is chargeable to the APPROPRIATION:.....
.....
.....Coast Guard, 1917.....

(b) In forwarding bills for settlement, segretate the requests by appropriations, not more than one appropriation to be included in any bill. Requests must accompany, and the numbers thereof be entered on, each bill rendered.

(c) Any number of requests chargeable to the same appropriation, may be included in one bill.

(d) Bills should always be rendered on blank forms furnished by the Government.

(e) Transportation companies will please not make notations on the face of a request to supply any omission by the traveler as to points of travel and character of service furnished.

INSTRUCTIONS.

1. To obtain transportation on this request, the holder should present the same to a regular ticket agent of the company on which it is drawn. Unless the request contains other specific directions, the agent will issue in exchange an ordinary passenger ticket at the lowest limited rate, which shall be described as "first-class limited transportation"; Provided, that this request shall not be used to obtain transportation involving any excess fare, or of a class of greater value than first-class limited.

2. Whenever possible, requests should be fully filled out in ink by the issuing office. When conditions make this impracticable, it should be the duty of the person to whom the request is issued to complete it in ink in every particular before surrendering it to the ticket agent. It is particularly important that the description of the transportation or accommodations requested and obtained be clearly indicated in the spaces provided therefor and that the spaces not required be stricken out.

3. The second space may be used for round trip, excursion, colonist, mileage, or any form of multiple trip tickets, the description of each of which must include the number of days or miles or trips or coupons, which may determine the value of each. This space may also be used for stateroom on steamboat or steamship when the same is not included in the fare. Berths must always be described as "upper" or "lower."

4. Erasures, interlineations, or alterations will be authenticated and explained by the person making them. This is not to be construed to authorize the issuance of transportation, the value of which exceeds that called for by the issuing officer; but in case same is furnished, the excess cost should be collected from the traveler.

Note: See instructions on the reverse side of the memorandum copy.

Filed April 15, 1919. L. & N. R. R. vs. U. S. No. 33290.

A true copy. Test this Feb. 10, 1922.

F. C. KLEINSCHMIDT,
Assistant Clerk, Court of Claims.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE LOUISVILLE & NASHVILLE RAILROAD Company, appellant, *v.* THE UNITED STATES. } No. 147.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

(1) Except in so far as concerns the item of $252.70 for the transportation of "Coast Guards" (R. 5, 6), the brief on behalf of the appellant is merely an attempt to reargue the questions decided by this court in *Oregon & Washington R. R. Co.* v. *United States* (255 U. S. 339), and *Western Pennsylvania R. R. Co.* v. *United States* (255 U. S. 349). An attempt is made on pages 15 *et seq.* of the brief on behalf of the appellant to distinguish these cases, but it is difficult to understand upon what ground counsel bases the distinction. If it be that the Comptroller of the Treasury had, prior to the time the bills for this transportation were presented, ruled that a claim for the full commercial rates would not be allowed, that point is expressly covered by the

decision of this court in the *Oregon & Washington R. R. Co. case.* (See 255 U. S. 346.) If it be that the appellant's officers never gave their assent to the rulings of the Comptroller and the actions of the disbursing and accounting officers based thereon, this point was also fully considered by this court in the cases referred to. (See especially 255 U. S. 354, 355.) The Court of Claims in the present case expressly based its decision upon its prior decision in the *Oregon & Washington R. R. Co. case.* (R. 6; *L. & N. R. R. Co.* v. *U. S.*, 55 Ct. of Clms. 45, 48.) Since, therefore, the prior decisions of this court completely govern the present case as to all of the items except that in respect of "Coast Guards," the judgment should be affirmed as to such items.

(2) As to the item relating to "Coast Guard," the Court of Claims held that a different question arose from that arising as to the other items, for the reason that the appellant rendered its bills as to this item at full commercial rates without land grant deductions, and the deductions were made by the accounting officers. Under these circumstances, the Court of Claims held that the question arose on the record whether the transportation of "Coast Guards" was transportation of "troops of the United States," within the meaning of the statutes dealing with the subject, as construed by this court in *United States* v. *Union Pacific R. R. Co.* (249 U. S. 354); and, on that question, the Court of Claims held that Coast Guards fell within the class as to which no more than land grant rates could be charged.

The transportation in question, it is found, took place after the passage of the act of January 28, 1915. (C. 20, 38 Stat. 800.) By section 1 of this act it was provided as follows:

> There shall be established in lieu of the existing Revenue-Cutter Service and the Life-Saving Service, to be composed of those two existing organizations, with the existing offices and positions and the incumbent officers and men of those two services, the Coast Guard, which shall constitute a part of the military forces of the United States and which shall operate under the Treasury Department in time of peace and operate as a part of the Navy, subject to the orders of the Secretary of the Navy, in time of war or when the President shall so direct.

There is no question raised in this record as to whether the Coast Guards in question were transported as a body or individually, and it must therefore be assumed as against the plaintiff in the action that they were transported as a body. The only question, therefore, is whether the word "troops" includes all persons in the military service of the United States, or whether it includes only those persons directly concerned with war on land. It should be observed that the act of January 28, 1915 (c. 20), expressly provides that the Coast Guards shall operate as a part of the Navy in time of war. The record does not state whether the particular persons transported under this heading in the present case were transported in time of war or not, although

Finding V is to the effect that the men of the Naval Reserves, the naval auxiliary service, and the Naval Militia were transported during time of war. The same assumption must be made as against the appellant as to Coast Guards, or, at most, if the matter be deemed material, an additional finding would have to be made upon the subject. Assuming that the Coast Guards in question were transported in time of war, they were, by express provision of the statute quoted above, a part of the Navy, and the question therefore arises, in this aspect of the case, whether the phrase, "troops of the United States," is confined entirely to the land forces, a point which never seems to have been decided, except in the present case.

There is nothing in the word "troops" which, by its necessary content, excludes any particular portion of the military forces, the word meaning merely "a body." Every reason which would induce Congress to exact land-grant rates for the transportation of soldiers would apply to the transportation of sailors, and such a construction should therefore be given to the acts relating to the transportation of troops of the United States. In *In the matter of Stewart* (7 Robertson (New York Superior Court) 635) it was held that the provision of the naturalization laws giving special privileges to persons who had enlisted "in the armies of the United States" applied to the Navy, the court saying:

> When we speak of the military power of a country we intend as well its seamen as its soldiers, its naval as well as its land forces.

> In its etymology the word *army* denotes "men in arms," whether ashore or afloat; and historically we know that not until a comparatively recent period in any country, was the navy distinguished as a separate and independent establishment.
>
> Indeed, even now, only in some special case, and when a particular application is designed, do men speak of the army as distinguished from the navy. The term in law language is *nomen generalissimum*, and includes the navy; except its meaning be restricted in the particular instance.

In *United States* v. *Dunn* (120 U. S. 249, 252), in holding that an officer in the Marine Corps was an officer in the Navy within the meaning of a certain statute, Mr. Justice Miller, delivering the opinion of the court, said:

> The military establishment of this country is divided by the general laws of the United States into the Army and the Navy, and over each of these one of the great heads of departments, called Secretaries, is appointed to preside, to manage, and to administer its affairs.

If it be assumed that the transportation of the "Coast Guards" in question was not effected in time of war, in which event the Coast Guard, it is provided by the statute, shall operate under the Treasury Department, it is submitted that the result would be the same, as the statute expressly provides that "the Coast Guard shall constitute a part of the military

forces of the United States" in time of peace, as well as in time of war. The courts can not go behind this declaration of Congress, nor deprive the force of the military character conferred upon it by Congress, by reason of the provision that it shall operate under the Treasury Department. The nature of its functions is evidently military, as shown by the provision that it shall be under the jurisdiction of the Secretary of the Navy in time of war, and the fact that, during time of peace, it is placed under the jurisdiction of the peace establishments, does not deprive Congress of the right to class it even in that event as part of the military forces.

It is submitted that the judgment of the court below should be affirmed.

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